fraud, or, misrepresentation, the party signing it is bound, and it is wholly immaterial,

(1) whether he has read the document or not
(2) whether he knows no English and the contents were not explained to him.

In the instant appeal there is no allegation of fraud or misrepresentation and as the hirer has signed the agreement knowing fully well that it was a contract for the purchase of a BMW car, the hirer cannot be heard to say that she did not know the terms of the agreement. This principle applies equally to the guarantor. This ground fails.

Next, it was contended by learned Counsel for the appellants that the respondent could not claim damages without repossessing the BMW car. Looking at the statement of claim it is apparent that the respondent's claim is for unpaid rentals and not for damages for any other loss in respect of the BMW car. A duty to mitigate loss of damages will only arise if a claim is made for any other loss other than arrears of unpaid rentals. Such a duty does not arise here as the respondent is merely claiming for unpaid rental. Furthermore there is no statutory duty under the Act for the owner to repossess the BMW car before the owner files an action against the hirer. As such this ground also fails.

Learned Counsel for the appellants submitted further that they were not liable to pay rentals for the BMW car for the duration when the said vehicle was in the custody of the police. However, such a situation is covered by clause 2(iii) of the agreement which provides that the hirer "... will keep the owner indemnified against all loss and damage to the vehicle for whatever cause arising ..." Accordingly, the appellants are liable to pay the unpaid rentals for the BMW car during the period the said vehicle was in the custody of the police (see *Ka Yin Credit & Leasing Sdn. Bhd. v. Pang Kim Cha & Bros. Development Sdn. Bhd.* [1989] 2 MLJ 61).

For the reasons adumbrated above, I dismissed the appellants' appeal with costs.

Appeal dismissed.

PUBLIC PROSECUTOR

v.

BOY BIN ISLAIS

HIGH COURT, TAWAU
TUAN IAN H.C. CHIN JC
[CRIMINAL TRIAL NO. T.3 OF 1988]
10 MARCH 1993

DANGEROUS DRUGS: Accused seen flinging the bag containing cannabis - Chemist report not challenged - Presumption not rebutted.

EVIDENCE: Age of Accused - Statement by Accused as to his age - Is the statement admissible - Is the statement proof of the age of the Accused - Who carries the burden of proving the age of Accused.

A police party spotted three persons which included the Accused, walking in single file and with the Accused foremost carrying a bag on the path towards their direction. As Accused walked past the police party, he was held around the waist from behind. The Accused was seen flinging the bag he was carrying backwards. The other two persons fled. The bag was retrieved and found to contain dried vegetable matter which was later sent to the chemist for analysis. The chemist on analysis found the dried vegetable matter to be cannabis. The chemist report was not challenged by the defence.

The Accused maintained that he was not yet 18 at the time of the commission of the offence whereas the prosecution maintained that he was 21 at the relevant time.

Held:

[1] It is for the defence to challenge the evidence of the chemist as reduced into writing in the chemist report and the evidence was not and in fact could not in view of the absence of the chemist be challenged. Therefore, at that stage, the evidence of the chemist as contained in the chemist report that the dried vegetable matter was cannabis stands unchallenged.

[2] The fact that the Accused flung the bag was indication enough that he was carrying drugs as the Accused wanted to get rid of the incriminating evidence by attempting to dispose of it by flinging it away. The defence did not point to any evidence of the prosecution neither have the defence adduced any

evidence to suggest that the weight of the cannabis was not 444.3 grams. There is therefore nothing to rebut the statutory presumption of trafficking. The Accused had failed, on a balance of probabilities to rebut the said three statutory presumptions.

[3] Without the statement of the Accused there is therefore no evidence before the Court as to the age of the Accused at the time of the commission of the offence. The Accused need only prove his age if there had been some evidence adduced by the prosecution with regards the age of the Accused. The Accused, in his defence, had given evidence that he was under 18 years of age at the time of committing the offence and the Court cannot say, on the evidence before the Court and upon visual inspection of the Accused, that the Accused could not be under 18 years of age at the time of committing the offence. There is no doubt that the Accused is a youthful person with his rather surprisingly smooth complexion. It is not incredible that he was not yet 18 at the time of the alleged offence. At the very least there is a doubt as to the age of the Accused and the doubt must be resolved in favour of the Accused.

[Accused convicted and sentenced to be detained during the pleasure of His Excellency, the Yang Dipertua Negeri Sabah].

Cases referred to:
Ooi Lean Chai v. Public Prosecutor [1991] 2 CLJ 1304 ***(foll)***
Loo Keck Leong v. Public Prosecutor [1992] 2 MLJ 177 at p. 181 / [1992] 3 CLJ 1332 ***(cit)***
Public Prosecutor v. Alcontara a/l Ambross Anthony [1993] 1 AMR 10 / [1993] 1 CLJ 206 ***(refd)***
Jayaraman & Ors. v. Public Prosecutor [1988] 1 MLJ 398 ***(refd)***
R v. Cox [1898] 1 QB 179 ***(refd)***
Johnanak Liman & Anor. v. Public Prosecutor [1968] 2 MLJ 236 ***(refd)***
Senevirante v. R [1936] 3 All ER 36 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 113, 399
Criminal Procedure Code (Sarawak Cap. 58), s. 219
Dangerous Drugs Act 1952, ss. 2, 37A, 39B(1)(a)
Dangerous Drugs (Amendment) Act 1983, s. 2
Evidence Act 1950, ss. 29, 106
Juvenile Courts Act 1947, ss. 11, 16
Registration of Births and Deaths Ordinance [Cap. 123], s. 31(5)

Other sources referred to:
Phipson on Evidence 14 Edn. para 1-11, 17-22

For the Accused - C.C. Liew (Lawrence Chai with him)
For the prosecution - N. Rajendran; DPP

JUDGMENT

Ian H.C. Chin JC:

I. *The charge*:

The Accused is charged under s. 39B(1)(a) of the Dangerous Drugs Act, 1952, for trafficking in 444.3 grammes of cannabis on 7 December 1986 at about 7.30 p.m. at Jalan Kampong Simunul, in the District of Semporna, in the State of Sabah. The trial of this case took place on 2, 3, 4 and 5 March 1993. It was adjourned to today for judgment.

II. *Prosecution Evidence*

The evidence at the close of the prosecution case are these. One constable Madsarapi Hj. Mahijalan (PWl) at about 7.00 p.m. on 7 December 1986 received information that a male Suluk Filipino will sell ganja that night at Jalan Kampong Simunul. PWl reported to Inspector Ratan Kumar Singh (PW3) the information he received. PW3 by about 7.10 p.m. had organized an ambush party and left the district police headquarter for the place of ambush. The ambush party included PW3, PW1 and one constable Ismail Atang who had since passed away in 1987. The ambush party laid in wait behind some banana trees besides a path that led to the Kampong Simunul Road. At about 7.30 p.m. PW1 spotted three persons, which included the Accused, walking in single file and with the Accused foremost carrying a bag on the path towards their direction. PW1 immediately gave the pre-arranged signal to PW3 of the sighting of the target of the ambush. As the Accused walked pass PW3, PW3 rushed out of his ambush position, shouted "police" and held the Accused around the waist from behind with his two hands. PW1 and PW3 saw the Accused fling the bag he was carrying backwards and saw where the bag landed. The other two persons fled. PW1 handcuffed the Accused behind his back. The bag was retrieved by PW3 who examined it and found it to contain dried vegetable matter (wrapped in two plastic bags, a sarong and sheets of newspapers) which was later sent to the chemist for analysis. The evidence shows an unbroken chain in the custody of the dried vegetable matter from the time it was retrieved by PW3 to the time it was produced in Court during the trial of this case.

The said dried vegetable matter was sent to and examined by a chemist who prepared a chemist report (Exhibit P12) which was served by PW1 on the Accused in the prison on 14 February 1989 in pursuance to s. 399 of the Criminal Procedure Code. The Accused acknowledged receipt by signing on a document produced in Court as Exhibit P3. There was no notice from the Accused that he required the attendance of the chemist who prepared the report. The chemist report was accordingly admitted in evidence. The relevant part of the chemist report reads:

> I examined the package submitted and found in it a big colourless transparent plastic bag containing a white plastic shopping bag which contained a green plastic shopping bag. I found in the green plastic shopping bag a newspaper package which was wrapped with an old sarong. On further examination I found the newspaper package to consist of four (4) layers of 'Manila Bulletin' newspaper containing 444.3 grammes of dried vegetable matter which, on analysis, I found to be cannabis. Cannabis is as defined in s. 2 of The Dangerous Drugs (Amendment) Act 1983.

The court was bound to admit the chemist report and did so. See *Ooi Lean Chai v. Public Prosecutor* [1991] 2 CLJ 1304.

III. *Case to Answer.*

Very short it may be the just quoted statement of the chemist but it suffices at the close of the prosecution case as *prima facie* proof that the dried vegetable matter the Accused was carrying was cannabis as defined in s. 2 of the Dangerous Drugs Act, 1952. See *Loo Keck Leong v. Public Prosecutor* [1992] 2 MLJ 177, at p. 181. Since the Accused had custody or control of the bags containing the cannabis, the evidence being that PW1 and PW3 saw the Accused carrying the bag containing the cannabis before he flung it, and since the cannabis weighed more than 200 grammes, the evidence being that the cannabis weighed 444.3 grammes, the statutory presumptions of possession, of knowledge and of trafficking of the cannabis have been activated which the Accused has to rebut. I therefore ruled that a case against the Accused had been made out which if unrebutted would warrant his conviction. I called upon the Accused to enter upon his defence.

I am aware of the opinion expressed by Vincent Ng Kim Khoay, JC in the case of *Public Prosecutor v. Alcontara a/l Ambross Anthony* [1993] 1 AMR 10 which is this - prior to the case of *Loo Keck Leong v. Public Prosecutor* [1992] 2 MLJ 177, the government chemists had conducted tests only to detect the presence of cannabis resin, irrespective of the quantity detected and that quantitative tests on cannabis resin in such plant material were alien to such chemists. Though I am inclined to believe in the correctness of the assumption - that quantitative tests are hitherto the *Loo's Case* alien to chemists in the country - nevertheless, there is no legal or factual basis for saying that just because one chemist in one particular case had demonstrated that he was not doing any quantitative tests then all the chemists in the country in all other cases must have also failed to do the quantitative tests and thus render their chemists reports ineffective to prove cannabis. The facts of each case has to be investigated to determine whether the quantitative test was performed. It cannot be assumed just because it was not done in one case it must necessary be the case with all other cases. I therefore cannot assume that in this case the quantitative test regarding the presence of resin had not been done. In fact on the authority of *Loo's Case*, the contrary had to be assumed. It is for the defence to challenge the evidence of the chemist as reduced into writing in the chemist report and the evidence was not and in fact could not in view of the absence of the chemist be challenged. Therefore, at that stage, the evidence of the chemist as contained in the chemist report that the dried vegetable matter was cannabis stands unchallenged.

IV. *Defence Evidence.*

The Accused on 4 March 1993 gave evidence on oath in Suluk and said he was, as at 4 March 1993, 23 years old having been born in June, 1969. He came from the Philippines and entered Sabah illegally in 1986. After reaching Sabah he worked as a fish loader for an ice factory in Semporna. While in Semporna he stayed in Kampong Sri Jaya.

On 7 December 1986 he was leaving the ice factory for Kampong Sri Jaya when a person called Jani, who was sitting in a coffee shop,

called him "TOL" (meaning, in Suluk, relative) and he then entered into conversation with Jani regarding his work in the ice factory and Jani's purchase of fish from the ice factory. He was about to leave Jani after telling Jani that there was no fish in the ice factory when Jani asked him to help him to find something in Semporna for his towkay who had come from Sandakan. He was then taken by Jani to see the towkay who was standing beside a car just outside the coffee shop and he was introduced. Jani then entered into conversation with the towkay which he did not understand. Jani thereafter turned to him to ask him whether he knew anyone who sells ganja. He was so shocked that he did not answer him but later told him that he cannot help him because it is against the law. He then excused himself and proceeded to go home. Jani asked him to go with Jani and the towkay so that they can send him home but he declined the offer and continued with his walking until he heard Jani calling for someone which he thought was him but was in fact not so. He continued with his walking home along the path leading to the Kampong Simunul Road. When he reached the junction of the path and Kampong Simunul Road he saw the same car, with Jani and the towkay inside, parked at the junction. In fact he saw Jani drive the car before in Semporna. Jani called him from the car and asked whether he saw the man that he called out for at the ice factory and he answered he had not. Jani then asked him to call for a male person at a candy shop which though it can be seen from the car was some distance from the car. He walked four steps from the car to get nearer to the candy shop and shouted "TOL" for the said male person who was called Basir. There was light from near the candy shop and he could see Basir looking at him after he had called out his name. Basir asked him why he called him. Basir then walked towards him carrying something white over his shoulder but he turned and proceeded with his journey home. As he was walking away he heard someone shout "Police". After hearing "police" being shouted he turned round and saw Basir running and he also saw 2 men chasing Basir. Then someone hugged him from behind with his hands held as well. He was not carrying anything at that moment. He was later handcuffed by two other persons, one of whom was PW1 and that PW1 carried a white plastic. PW1 asked him to look at the white plastic and they asked him questions which he did not understand. He did not try to struggle to get free after he was hugged. He was beaten up by the police. He was thereafter taken to a hospital by a white car where he was at the hospital guarded by PW3 while PW1 carried the white plastic into a room in the hospital and he was taken inside the room to watch leaves being weighed on a scale. He was thereafter taken to a police station where he was beaten up again. He was taken to PW3's room where he was questioned by PW3 but he did not understand what PW3 said. He was thereafter taken to the old police station where he was kept for 9 days and where a photograph of him was taken by someone.

Under cross-examination he said he came to Semporna some 5 months prior to 7 December 1986 in order to look for a job to finance his search for his sister. Two months after his arrival he got the job at the ice factory earning RM8 a day. He admitted, after it being put to him by the learned DPP, that he gave his name and race to PW3 after being asked by PW3 but he denied that PW3 had asked for his age and that he had given his age because he did not understand the questions. But he later on said the word "Umur" sounds like "Umur" in Suluk which also means age. He also said in cross-examination that he knew Jani before 7 December 1986 as Jani used to come regularly to the factory to buy fish. He said he did not know why of all people he should be approached by Jani to buy ganja for the towkay. He said he could see Basir because of lights coming from the candy shop and the houses.

V. *Consideration of the Defence*

The defence is therefore that the Accused was not the person who was arrested with the white plastic bag but it was a person called Basir whom the Accused had nothing to do with apart from calling for him at the behest of one Jani. The alleged existence of Jani, the existence of Basir and his possession of the white plastic bag, the existence of the towkay, the existence of the Mazda car and the existence of two more persons (presumably policemen other than PW1, PW2

and PW3) were not put to the prosecution witnesses at all. The only case that was put to the prosecution witnesses were that the Accused did not carry the white plastic bag, his hands were held by PW3, he could not and did not throw the white plastic bag away as told by PW3 to the Court and that the white plastic bag containing the cannabis was recovered by PW1 presumably from an unnamed person. It is the words of the Accused as against that of PW1 and PW3 with regards to the carrying of the white plastic bag containing the cannabis that the Court has to choose. The Accused's version of what happened on the evening of 7 December 1987 at the junction of the path and the Kampong Simunul Road cannot be believed.

He allegedly expressed shock at being asked by Jani outside the coffee shop whether he knew of anybody who sells ganja because it is against the law to carry ganja but such a reaction could not have been brought about as the Accused was not asked whether he was carrying ganja or had ganja to sell but only that whether he knew anyone who had ganja to sell; the question and the answer are *non sequitur*.

He alleged that Jani and the towkay were in a car at the junction of the path and the Kampong Simunul Road when Jani asked him to call someone known as Basir who was at a candy shop some distance away and he unquestioningly obliged by shouting "TOL", a word meaning, according to the Accused, relative in Suluk, despite having earlier on allegedly walked away from the same Jani because Jani had asked him whether he knew of anyone who had ganja to sell; he at one moment appeared to show a disdain for Jani by walking away from Jani and yet in the next instance appeared to be so obliging to Jani as to do the bidding of Jani by calling for Basir - this does not make any sense and even more so when Jani could have himself either called for or fetched Basir.

It is suggested by the evidence of the Accused that the cannabis was recovered by PW1 who, together with another, had chased after Basir, and Basir only, and that PW1 later came and showed the Accused the cannabis. But during the prosecution stage of the case, Counsel for the Accused had alleged, by putting to PW1, that the cannabis was recovered by PW1 from one of two persons which PW1 was chasing. See page 9 of the Notes of Proceedings. In one breadth the Accused appears to say PW1 was chasing two persons one of whom carried the cannabis when in another breadth the Accused appears to say that PW1 was chasing only one person who was carrying the drug. The Accused would appear to finetune and modulate his allegations not according to the truth but according to what he can perceive as creating holes and doubts in the prosecution case and in order to support his allegations. If this is not so the Accused would not at the prosecution stage of the case allege one thing and then at the defence stage allege something else. When it comes to PW3 no questions whatsoever were put to PW3 as to the Accused's version of what happened that evening with the result that PW3's version stood unshaken. If Jani, the towkay and the Mazda car did exist, why was there no mention of them by the Accused as to their whereabouts shortly before and shortly after the Accused was arrested.

That the Accused is not a truthful witness can be further gathered from the evidence he gave. He had in his examination-in-chief said that before his arrest he had met a person called Jani and had asked Jani whether he was in the business of carrying fish from the ice factory. This was intended to convey the impression that he did not know Jani or that he did not then know what Jani's work was. But in cross-examination he said he knew Jani before 7 December 1986 because Jani used to come regularly to the ice factory to buy fish. Again he said he did not understand the questions put to him by PW3 after his arrest and yet when cross-examined he admitted his comprehension by admitting that he supplied his name and race to PW3. When the Accused had demonstrated such shiftiness in giving his evidence on oath then it should not be a surprise to him that he could not be believed.

It is for the reasons that I have set out above that I do not believe the allegations of the Accused. I find that PW1 and PW3 did see the Accused carry the white plastic bag containing the cannabis, PW1 and PW3 did see the Accused fling the white plastic bag containing the cannabis away and that PW3

did recover the white plastic bag containing the cannabis which the Accused flung away.

VI. *Whether any reasonable doubt.*

Though I do not believe the version of the Accused as to what happened on the evening of 7 December 1987 when the cannabis was recovered I still have to consider whether the Accused had on a balance of probabilities cast any doubt on the case of the prosecution. This involves considering whether the Accused had on a balance of probabilities rebutted the said three statutory presumptions of possession, knowledge and trafficking.

The Accused was seen by PW1 and PW3 in sufficient light carrying the white plastic bag containing the cannabis. It was suggested by Counsel for the Accused that PW3 could not have seen where the white plastic bag containing the cannabis landed as it was thrown backwards by the Accused and since PW3 was reverse bear-hugging the Accused (which meant that it was thrown also behind PW3's back), PW1 had given evidence that he saw PW3 retrieve the white plastic bag containing the cannabis from the spot where the Accused had flung it. PW1 was not cross-examined on this point. PW3 was also not cross-examined when he stated that he could see where the white plastic bag containing the cannabis was flung. There is nothing incredible about PW3 being able to see where the white plastic bag containing the cannabis had landed because though the body was fixated the head can, to a certain degree, be rotated and it could be that PW3 saw the spot where the white plastic bag containing the cannabis landed when his head was turned while reverse bear-hugging the Accused and after the white plastic bag containing the cannabis was thrown. In any event, there was only one white plastic bag containing the cannabis and it was not suggested that there was another bag and only one was recovered. There is therefore no doubt that the white plastic bag containing the cannabis was the one which PW1 and PW3 saw the Accused carry and which was recovered by PW3 after the Accused had flung it.

Nothing was advanced by the defence as indicating that the Accused did not know that there was cannabis inside the white plastic bag which he was carrying before he flung it. The fact that the Accused flung the bag was indication enough that he was carrying drugs as the Accused wanted to get rid of the incriminating evidence by attempting to dispose of it by flinging it away.

Though I have after calling for the defence indicated to Counsel for the Accused that he could call the chemist to testify he declined with the result that there is nothing to rebut the evidence of the chemist that what he examined was cannabis within the meaning of s. 2 of the Dangerous Drugs Act, 1952. Neither was there any challenge that the weight of the cannabis was 444.3 grammes. The defence did not point to any evidence of the prosecution, and I cannot see any, and neither have the defence adduced any evidence to suggest that the weight of the cannabis was not 444.3 grammes. There is therefore nothing to rebut the statutory presumption of trafficking.

Having come to those conclusions, I therefore am of the opinion that the Accused had failed, on a balance of probabilities, to rebut the said three statutory presumptions.

VII. *The Verdict.*

I therefore find the Accused guilty and convict him of the offence of trafficking in 444.3 grammes of cannabis in contravention of s. 39B (1)(a) of the Dangerous Drugs Act, 1952. I will now consider the sentence.

VIII. *The Sentence*

The Accused maintained that he was not yet 18 at the time of the commission of the offence whereas the prosecution maintained that he was 21 at the relevant time. I therefore have to find whether the Accused was under the age of 18. I have no doubt that PW3 was telling the truth when he said that after arresting the Accused he asked the Accused his name, race and age in Malay and the Accused replied, *inter alia*, that his age was 21 years old. That the Accused understood the question was admitted by the Accused because, according to the Accused, the word ''umur' sounds and means the same in Suluk, the language of the Accused. The issues surrounding this statement of the Accused that he was 21 years old, are:

(1) is the statement admissible;
(2) is the statement proof of the age of the Accused; and

(3) who carries the burden of proving the age of the Accused. I will first deal with the laws pertaining to these issues.

A. *Legal Principles*

(1). *Admissibility of Statement*

Statements, whether oral or written, made by an accused person to the police after his arrest are not admissible except when they are made voluntarily and after the statutory caution was administered. See s. 113 of the Criminal Procedure Code; *Jayaraman & Ors. v. Public Prosecutor* [1988] 1 MLJ 398; and s. 37A of the Dangerous Drugs Act, 1952.

(2). *Statement as proof of age.*

The simplest manner of proving age is to resort to statutory presumptions. In Sabah there is the Registration of Births and Deaths Ordinance [Cap. 123] where s. 31 (5) provides for a copy or extract of an entry in the register of births to be *prima facie* evidence of, among others, the date of birth. Another statutory presumption is that under s. 11 of the Juvenile Courts Act, 1947, which reads:

> (1) Where, in a charge for an offence triable under this Act it is alleged that the person by whom the offence was committed was under or had attained any specified age, and he appears to the Court to have been at the date of the commission of the alleged offence under or to have attained the specified age, as the case may be, he shall for the purpose of this Act be presumed at that date to have been under or to have attained that age, as the case may be, and any order made therein shall not be invalidated by any subsequent proof that the age has been incorrectly stated.
>
> (2) Where the court is, or the Police are, in doubt as to the exact age of the person by whom an offence is alleged to have been committed the certificate of a Government Medical Officer to the effect that, in his opinion, the person has or has not attained a specified age may be given in evidence.

The best evidence would be to call the person who delivered the birth. Even opinions of persons acquainted with the person concerned could testify to the age of the person. In *R v. Cox* [1898] 1 QB 179, the evidence of

(1) an officer of the National Society for the Prevention of Cruelty to Children that he had seen the children and that he believed their ages to be under sixteen,

(2) a constable generally confirming the said officer and

(3) the mistress of the elementary school which the children had attended that they were under the statutory age limit for such schools, were admitted as evidence for the jury to decide whether the children were under sixteen years of age.

This appears to be an exception to the hearsay rule. Another method of proving the age is by inspection and this is stated in Phipson on Evidence, 14 edn, at para. 1-11, thus:

> Inspection has been defined as a substitution of the eye for the ear in the reception of evidence, and as a general rule is allowed whenever it is practicable, and will assist the tribunal in arriving at a decision. The practice dates back for some seven centuries to the old trials by inspection, which were the appropriate means of determining certain questions, e.g. age, identity, ...

One final method of proving the age would be admission by conduct. Thus it is said in Phipson on Evidence, 14 edn., at Para. 17-22:

> It is sometimes said that acts of treatment by either parties or strangers, expressive merely of their opinion or belief as to the existence or non-existence of facts, are not receivable against a party except when operating as admissions by conduct.

and the said case of *R. v. Cox* was cited as an example of treatment as evidence of age.

(3). *Burden of Proof.*

It appears that there is authority to suggest that the burden shifts to the Accused to establish his age on the ground that "the age of a person is peculiarly within his knowledge" and there had been some evidence adduced by the prosecution with regards to the age of the Accused. This was decided by the Federal Court in the case of *John anak Liman & Anor. v. Public Prosecutor* [1968] 2 MLJ 236 where it is said at p. 237:

> The only reliable evidence before the court as to the age of each of these appellants was the statement of each appellant that he was 18 years of age. ... Section 219 of the Criminal Procedure Code (Sarawak Cap. 58) provides that "Sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of eighteen years old". Some

attempt was made by Counsel to suggest that this casts a burden on the prosecution to prove that an Accused is over the age of 18. We do not accept this view since the age of a person is peculiarly within his knowledge. The section places a responsibility on the court to be satisfied that the Accused is not under 18 years of age. If there was any evidence that the Accused at the time of the offence was over 18 the bare statement that he was 18 years of age at the time of trial might well not be sufficient to contradict such earlier evidence. But in this case the only evidence is as to their age at the time of trial. We therefore feel that there is some doubt as to whether they had attained the age of 18 on or before the date on which the offence was committed and accordingly we must resolve that doubt in favour of each Accused...

A provision similar to that of s. 219 of the Sarawak Criminal Procedure Code can be found in s. 16 of the Juvenile Courts Act, 1947 which says:

Sentence of death shall not be pronounced or recorded against a person convicted of an offence if it appears to the Court that at the time when the offence was committed he was a juvenile: but in lieu thereof the Court shall order him to be detained during the pleasure of the Yang di-Pertuan Agong if the offence was committed in the Federal Territory of Kuala Lumpur and the Federal Territory of Labuan or during the pleasure of the State Authority if the offence was committed in the State, and, if it is so ordered, he shall, notwithstanding anything in the other provisions of this Act, be liable to be detained in such place and under such conditions as the Yang di-Pertuan Agong or the State Authority may direct, and whilst so detained shall be deemed to be in legal custody.

John Anak bin Liman's case appears to invoke s. 106 of the Evidence Act, 1950, which says that - "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him". Is the age of a person really peculiarly within his own knowledge? We know of our age only from what we have been told or from an extract of an entry in a birth certificate. Thus it is strictly speaking hearsay if one gives direct evidence as to his own age. See Phipson on Evidence, 14th edn, para. 21-20, where it is said:

Thus even when a witness purports to be given evidence of a fact, that evidence will be inadmissible under the rule if based upon the knowledge of another, for example, when a witness purports to testify directly as to his own age or place of birth.

Sarkar on Evidence, 13th edn., at p. 965, on s. 106 states that the date of a child's birth is not a fact specially within the knowledge of the father but that it is within the knowledge of anyone who was present at the birth, and, at p. 961, the said author has this to say in relation to s. 106 and I quote:

As stated by Phipson, "in the absence of statutory provision, the better opinion seems to be that, in general, some *prima facie* evidence must be given by the complainant in order to cast the burden on his adversary" (Phip 8th Ed p34). This is undoubtedly the most practical or reasonable way of applying the section and it has also been held here that before an Accused person can be required to prove the matter within his special knowledge, there must at least be some *prima facie* evidence against him... "In considering the amount of evidence necessary to shift the burden of proof, the court has regard to the opportunities of knowledge, with respect to the fact to be proved, which may be possessed by the parties respectively.

Finally, we have the Privy Council case of *Senevirante v. R* [1936] 3 All ER 36 which held that "in a criminal prosecution the onus of proof is upon the prosecution and there is no obligation upon the prisoner of proving facts especially within his own knowledge", except of course, if I may add, where statutes say so.

B. *Conclusions.*

The statement regarding his age which the Accused gave to PW3 after he was arrested is not admissible evidence as the statutory caution required by s. 113 of the Criminal Procedure Code had not been administered. I do not see how ss. 29 and 106 of the Evidence Act allow, as argued by the learned DPP, admission of such a statement since the Accused was not administered the statutory caution though he gave the statement voluntarily even assuming that s. 106 of the Evidence Act can be invoked. Without the statement of the Accused there is therefore no evidence before the Court as to the age of the Accused at the time of the commission of the offence. None of the methods enumerated above for proof of the age of the Accused had been employed by the prosecution. On the authorities that I have just cited the Accused need only prove his age if there had been some evidence adduced by

the prosecution with regards the age of the Accused. The Accused, in his defence, had given evidence that he was under 18 years of age at the time of committing the offence and the Court cannot say, on the evidence before the Court and upon visual inspection of the Accused, that the Accused cannot be under 18 years of age at the time of committing the offence. There is no doubt that the Accused is a youthful person with his rather surprisingly smooth complexion. I cannot say that it is incredible that he was not yet 18 at the time of the alleged offence. At the very least there is a doubt as to the age of the Accused and the doubt must be resolved in favour of the Accused.

Though I have earlier by citing various authorities cast doubt in the correctness of the decision of *John Anak Bin Liman* case that the age of the Accused is peculiarly within the knowledge of the person because, I am of the opinion, one's knowledge of one's birth can only come from someone else or from the registry of birth, I nevertheless have to abide by the decision, it being a decision of the then Federal Court. But that case is still of no help to the prosecution because there is no evidence at all, in view of the inadmissibility of the statement of the Accused as to his age, as to the age of the Accused. In any event and in view of *Senevirante* case, *John Anak Liman* case must not be read as laying down the law that it is for the Accused to establish his age before he can escape the death sentence. The solution to the problem which this case has highlighted may lie in the amendment of the Dangerous Drugs Act 1952 to provide for the necessary presumption of age.

Given my decisions above and in accordance with s. 16 of the Juvenile Courts Act, 1947, I order the Accused be detained during the pleasure of His Excellency, the Yang Di-Pertua Negeri Sabah.

The cannabis is to be destroyed by burning in the compound of the Court and in the presence of the Senior Assistant Registrar of the High Court in Borneo at Tawau.

PUBLIC PROSECUTOR

v.

MOK JIN SHING & 3 ORS.

HIGH COURT, SIBU
TUAN STEVE SHIM LIP KIONG J.
[CRIMINAL APPEAL NO. 8 OF 1992]
18 JANUARY 1993

CRIMINAL LAW & PROCEDURE: Appeal against sentence imposed by lower Court - Inadequacy of sentence - Whether decision of lower Court should be disturbed - Whether sentences passed commensurate with gravity of offence - Principles applicable.

The Public Prosecutor appealed against the sentences imposed on the respondents who were charged with and convicted of assisting in carrying on an illegal lottery. The learned DPP contended that the trial Magistrate did not consider sufficiently or at all the question of public interest in passing sentences on the respondents.

Held:

[1] Having regard to the public interest, the nature of the offences, its mode of commission, the background, character and antecedents of the respondents, the fines imposed on the first, second and fourth respondents and the binding over order made on the third respondent were manifestly inadequate in all the circumstances.

[2] The exhibits seized by the police were found in the room or rooms where the illegal 4-digit operation was going on which must suggest that they were used for the purpose of the operation. There is nothing to indicate or suggest that the exhibits in question belonged to any of the respondents. The exhibits are forfeited to the Government.

[Appeal allowed].

Cases referred to:

*R v. Ball 35 Cr. App. R. 164 (**refd**)*
*New Tuck Shen v. Public Prosecutor [1982] CLJ 38 / [1982] 1 MLJ 27 (**refd**)*

Legislation referred to:

Gambling Ordinance s. 4(c)
Criminal Procedure Code, s. 294

For the appellant - Mohd. Zaki bin Md. Yasin, SFC
For the respondents - Richard Wong Ho Leng; M/s. Wong Ho Leng & Co.